

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000283

02/18/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

GERALDINE GOY

MICHAEL J DEW

v.

STATE OF ARIZONA

SAMUEL K LESLEY

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5079616

Charge: 1. DUI
2. DUI WITH A BAC OF .10 OR MORE

DOB: 09/01/73

DOC: 06/27/96

1. Jurisdiction

This Court has jurisdiction of this appeal by the State pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A), and A.R.S. Section 13-4032(6).

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This case has been under advisement without oral argument and this Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the excellent Memoranda submitted by counsel.

2. Issue Presented

The only issue presented in this appeal by the State of Arizona is whether the trial judge erred in granting Appellee, Geraldine Goy's Motion in Limine to Suppress all Evidence from police officers written reports. Appellee successfully argued Rule 803(8), Arizona Rules of Evidence, precludes admission of hearsay from police officers' written reports which may be admissible pursuant to any hearsay objection. This State (Appellant herein) argued in this case that police officers' recorded recollections from their police reports were admissible six (6) years later (Appellee Goy failed to appear and a bench warrant was issued for her arrest; she was apprehended six years later, in 2002) where the police officers' had no present recollection of the facts of the case. Appellant argued to the trial judge that the police officers recorded recollections (from their written police reports) were admissible pursuant to Rule 803(5), Arizona Rules of Evidence. This Court concludes that the trial court erred and Appellant's position is correct.

3. Facts and Legal History

Appellee, Geraldine Goy, was arrested and charged on June 26, 1996 with two crimes: (1) Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-692(A)(1); and (2) Having a Breath Alcohol Concentration of .10 or Greater Within 2 Hours of Driving, a class 1 misdemeanor in violation of A.R.S. Section 28-692(A)(2). Goy failed to appear in court and a bench warrant was issued for her arrest. That warrant was quashed when she reappeared in 2002. Her case was scheduled for a jury trial on May 15, 2002. Prior to Goy's trial, the prosecution discovered that the arresting officers involved in Goy's apprehension and arrest had no present recollection of some important parts of their investigation. The State proposed to offer portions of their reports pursuant to Rule 803(5), Arizona Rules of Evidence, as "recorded recollections." Appellee Goy filed a Motion in Limine to Suppress the proposed "recorded recollections" of the police officers. This motion was heard and granted by the trial judge (the Honorable Malcomb Strohson) on May 15, 2002. Thereafter, the State filed a Motion to Dismiss which was granted by the trial court. The State promptly and timely filed a Notice of Appeal from the trial judge's order granting the Motion in Limine (Motion to Suppress).

4. Analysis and Discussion

Appellee argues that Rule 803(8) prohibits in all cases, and under all scenarios, the admission of a police report as evidence in a criminal case. That rule provides:

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(8) Public Records and Reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law (emphasis added).

And, Rule 803(5) which provides for recorded Recollections provides:

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witnesses' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The opening sentence to Rule 803, Arizona Rules of Evidence, provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness... .

Thus, it appears from the opening language within Rule 803 that each of the listed exceptions to the hearsay rule may be admitted as evidence. In simply looking at Rule 803, this Court notes that the language cited by Appellee Goy precluding admissibility of police reports in criminal cases is an exclusionary clause only found within Subsection 8 (public records and reports), and not repeated in any of the other hearsay exceptions. This is significant, because Appellee has argued, and the trial court found that the preclusion language found within Section 8 is a preclusion which is applicable to all other portions of the rule. In effect, Appellee argues that the preclusion against the admission of police reports in criminal cases in Section 8 "trumps" the provisions of all of the other subsections within Rule 803, so that a police report admissible under another hearsay exception could not be admitted because of subsection 8. Such a conclusion is not warranted.

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It does not appear that this issue involving the Arizona Rules of Evidence has been previously addressed by an Arizona Court. Neither party has cited any Arizona cases in support of their respective positions. However, Appellant has cited a well respected treatise in support of its position,¹ and for the proposition that the mere “fact that the police report might not be admissible under another section of hearsay exceptions does not preclude its admissibility under Rule 803(5).”² Appellee’s citations to Federal cases including United States v. Pena-Gutierrez³ is interesting, but that opinion is based upon the Federal Rules of Evidence, including Federal Rule 803(8). Appellee also cites a relevant and helpful article, entitled “Admissibility, over Hearsay Objection, of Police Observations and Investigative Findings offered by Government in Criminal Prosecution, excluded from Public Records Exception to Hearsay Rule...”.⁴ From the authorities cited by both parties, it is clear to this Court that the issue of the admissibility of police reports pursuant to the “recorded recollection” exception to the hearsay rule, or other hearsay exceptions, is a difficult issue which many courts have answered in many differing ways.

The “recorded recollection” exception to the hearsay rule found in Rule 803(5), Arizona Rules of Evidence, appears to be a completely different hearsay exception that the public records and reports exception found in Rule 803(8), Arizona Rules of Evidence. Under Section 5, the memorandum or record may only be read into evidence and not received as an exhibit unless “offered by an adverse party.” The Section 8 Public Records and Reports Exception permits the memorandum or record to be received as an exhibit. Most importantly, the recorded recollection exception found in Section 5 does not contain any limiting or exclusionary language referring to police officers and/or criminal cases. Thus, this Court concludes that a police report not admissible under Rule 803(8) Public Records and Reports Exception may be admissible under another hearsay exception, such as that found in Rule 803(5), the “Recorded Recollection Exception” of the Arizona Rules of Evidence.

5. Conclusion

This Court concludes that the trial judge erred in his legal finding that the public records and reports preclusion of admissibility of police officers’ written reports does apply to other provisions of the Rules of Evidence. A police report not admissible under Rule 803(8), the Public Records and Reports Exception, may be admissible under another hearsay exception, such as that specifically found in Rule 803(5), the Recorded Recollection Exception to the Hearsay Rule.

¹ McClellan, Arizona Courtroom Evidence Manual, 3rd Edition, Page 892.

² Appellant’s Opening Memorandum, at page 5.

³ 222 F.3d 1080 (9th Circuit 2000).

⁴ 56 ALR Fed 168.

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IT IS THEREFORE ORDERED reversing the order of the trial court granting Appellee Goy's Motion in Limine/Motion to Suppress Police Officers Recorded Recollections.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for proceedings consistent with this opinion.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT